

1 it's only one way that could probably move up  
2 the schedule somewhat.

3 JUDGE SIPPEL: Well, to me that  
4 doesn't sound unreasonable. But, again, I  
5 understand that there's a feeling in some  
6 areas of urgency here. And so to try to  
7 accommodate both of those things is going to  
8 be probably impossible for me to do. But on  
9 the other -- I'm just saying this is de novo  
10 hearing, and within reason, that's where I  
11 think -- that's where I intend to be tight,  
12 not expansive discovery, very focused  
13 discovery on a tight schedule. And I don't  
14 want to get phone calls saying that the  
15 witness is being harassed or anything like  
16 that, because I've been involved in that kind  
17 of thing. And that takes a lot of time. So  
18 as long as everything is -- I would certainly  
19 think that you could work something out, with  
20 NFL understanding that you're not going to get  
21 a 60-day decision out of this case the way  
22 it's set up now. And I'm on your side as far

1 as wanting to keep it as clean and quick as  
2 possible, but on the other hand, I'm not going  
3 to undercut somebody's case, somebody's  
4 putting on a case. And taking limited  
5 depositions that are very focused, taking  
6 deposition of an expert so you know what he's  
7 going to say, and I guess your key witness is  
8 going to be what, going to be your CEOs or  
9 people of -- certainly, people, the big  
10 business decisions. Their depositions are  
11 going to have to be taken, but again, not for  
12 two days. And the documents, what -- wasn't  
13 there a considerable exchange of documents  
14 when this was before the Bureau? No?

15 MR. SOLOMON: No, Your Honor.

16 JUDGE SIPPEL: How do you file a  
17 complaint without -- I thought -- I mean, I've  
18 seen some of those cases come to us, and  
19 there's quite a bit of discovery.

20 MR. LEVY: Your Honor, we  
21 submitted, and as I assume the other  
22 complainants did, we submitted declarations

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1 from witnesses, three or four witnesses,  
2 attached to some of those declarations were  
3 documents. Those are the documents that for  
4 violation purposes that we would rely on at  
5 any hearing. Those are the witnesses that we  
6 would rely on at any hearing. The witnesses  
7 whose statements are already part of the  
8 Commission's files, and which we've already  
9 indicated in a pleading that we intend to  
10 offer here.

11 Again, I come back to the expert.  
12 The expert is different. We're going to have  
13 to -- on the remedy side, we're going to need  
14 to submit some additional testimony. But on  
15 the violation side, virtually all of the  
16 evidence that we anticipate submitting is in  
17 already. And if that evidence isn't  
18 sufficient, we'll supplement it, we'll update  
19 it a little bit. If it's not sufficient to  
20 constitute our -- to satisfy our burden with  
21 a preponderance, then we know what the  
22 consequence is going to be.

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1 JUDGE SIPPEL: That's right. You  
2 don't have a prima facie case just because you  
3 put your documents in. I mean, you can rest  
4 and say you do, but that isn't going to just  
5 establish a prima facie case, unless I decide  
6 it does.

7 MR. LEVY: I understand that, Your  
8 Honor.

9 JUDGE SIPPEL: Okay.

10 MR. LEVY: That's exactly what I'm  
11 saying. But what I'm saying is, from our  
12 perspective, the issues are very narrow and  
13 straightforward. Did Comcast treat  
14 differently two similarly situated networks?  
15 If the answer is yes, then we go on to the  
16 remedy side. But whether or not they treated  
17 the two networks differently, or three, there  
18 are two that they own in the NFL network,  
19 there's no dispute about that. One they  
20 carried on a broadly distributed tier, one  
21 they carried on a premium tier, for which  
22 consumers had to pay an extra price. There's

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1 no dispute about that.

2 As far as whether the networks are  
3 similarly situated, discovery isn't going to  
4 answer that question. I mean, whatever facts  
5 there are to bear on that subject, Comcast has  
6 access to the same facts about the marketplace  
7 that we do.

8 MR. SCHONMAN: Your Honor, maybe I  
9 could give you some -

10 JUDGE SIPPEL: Go ahead.

11 MR. TOSCANO: Maybe I could give  
12 you some examples of document discovery that  
13 would be useful to us. These are merely  
14 examples. Mr. Levy is -

15 JUDGE SIPPEL: All right. Finish  
16 what you're saying. Go ahead.

17 MR. TOSCANO: Mr. Levy is  
18 suggesting that they're going to put in these  
19 declarations, and simply rely on them, put in  
20 favorable documents, deny us the opportunity  
21 to come up with unfavorable documents. One of  
22 their witnesses, for example, says that the

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1 NFL network has lost advertisers because  
2 Comcast put the NFL network on a sports tier.  
3 We're entitled to look at that witness'  
4 documents, to look at the advertising  
5 documents and see if we can find documents  
6 that are inconsistent with the attribution of  
7 the withdrawal of advertising from the NFL  
8 network to Comcast tiering network. There are  
9 a lot of other reasons an advertiser could  
10 withdraw advertising from the NFL network  
11 relating to the economy, relating to that  
12 advertiser specifically, relating to the  
13 restrictive terms in which the NFL network  
14 makes advertising available. And in order for  
15 us to probe that witness' statement about why  
16 the advertising was withdrawn, we can't just  
17 rely on that statement and the favorable  
18 documents that the lawyers for the NFL choose  
19 to accompany that statement. We need to get  
20 documents, we need to have access to other  
21 documents that are likely inconsistent with  
22 those statements.

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1 And, again, our experience in New  
2 York is that the document discovery has been  
3 invaluable in finding admissions of NFL  
4 executives that are flatly inconsistent with  
5 their litigation position.

6 JUDGE SIPPEL: But the issue is  
7 not the same in New York, though. Isn't that  
8 more contract interpretation?

9 MR. SCHONMAN: Well, that is a  
10 central issue here. Contrary to Mr. Levy's  
11 very simplistic characterization of a Section  
12 616 claim.

13 JUDGE SIPPEL: Yes.

14 MR. TOSCANO: The contract issue  
15 in New York is important for at least two  
16 reasons. First of all, there's the issue of  
17 whether Comcast has unreasonably restrained  
18 NFL's ability to compete fairly. It is  
19 virtually impossible to determine that Comcast  
20 did so when it was acting pursuant to a right  
21 that the NFL granted by contract in a contract  
22 that provided Comcast with compelling

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1 financial incentives to tier once that right  
2 became available to it, which is exactly what  
3 it did.

4 This goes to the very important  
5 question also of Comcast's motive in putting  
6 the NFL network on a sports tier. We disagree  
7 strongly with Mr. Levy's characterization that  
8 motive is not important. It's crucially  
9 important to understand Comcast's legitimate  
10 business reasons for taking the actions it  
11 did, legitimate non-discriminatory business  
12 reasons for taking its action. And that's a  
13 very important of the NFL's claim.

14 MR. FREDERICK: But those would  
15 all be things that the Comcast witnesses could  
16 testify to in their direct, as they would do  
17 in the MASN case, and as they already did -

18 MR. TOSCANO: That's correct.

19 MR. FREDERICK: -- in answering  
20 the complaint. Nothing that this gentleman  
21 has said undercuts the central notion that  
22 these issues are relatively simple and

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1 straightforward. They are, are the networks  
2 similarly situated? Yes or no? Was there  
3 differential treatment? Yes or no? Was there  
4 a legitimate business justification for  
5 treating them differentially? Yes or no? And  
6 is there a remedy that should be afforded to  
7 that differential treatment? Yes or no?

8 Those are the issues that you have  
9 before you, and three of them have already had  
10 evidence submitted to the Media Bureau as part  
11 of the process. It's only the fourth, the  
12 remedy, for which there is no evidence so far.

13 MR. COHEN: Your Honor.

14 JUDGE SIPPEL: Yes.

15 MR. COHEN: May I take another  
16 stab on scheduling.

17 JUDGE SIPPEL: Yes.

18 MR. COHEN: I don't want to get  
19 involved with NFL, MASN, they'll work it out.  
20 What we would propose for Wealth, and this  
21 will either be acceptable or unacceptable to  
22 Ms. Wallman, is we work out this protective

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1 order in the next ten days or so. We serve -  
2 and following up on Your Honor's comments and  
3 Judge Steinberg's comments, we are not  
4 contemplating, at least for Time Warner, and  
5 I think for some of us, and Comcast may have  
6 a slightly different view, we are not  
7 contemplating a full array of discovery. We  
8 are certainly prepared to forego  
9 interrogatories. Your Honor has already said  
10 that the parties would. That was part of our  
11 proposal. We are prepared to forego fact  
12 depositions. If we can get document  
13 discovery, we'll limit our document requests  
14 to ten, not with a thousand subparts, ten each  
15 so people will have to think about what  
16 documents they want, exchange them in 30 days,  
17 produce expert reports, have expert  
18 depositions. We think they can be finished by  
19 March 1. That is not an overwhelming amount  
20 of discovery, and then we can talk about the  
21 trial.

22 JUDGE SIPPEL: Well, so far I've

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1 got, at least on this side of the table, I got  
2 an April 1 date that I can work with, except  
3 I don't like to start cases on April Fool's  
4 Day. That's in the ball park, but you all  
5 want it earlier than that. I'm sorry. Mr.  
6 Schonman. I'm sorry.

7 MR. SCHONMAN: I've been listening  
8 to this now for about an hour, or 40 minutes,  
9 and I'm not sure how much agreement we're  
10 going to get among the various parties here.

11 JUDGE SIPPEL: I'm trying to get  
12 understanding. I don't think -- go ahead.  
13 I'm sorry.

14 MR. SCHONMAN: When Judge  
15 Steinberg determined that the 60-day time  
16 frame wouldn't work, he also decided that the  
17 parties are entitled to their due process.  
18 And I think he contemplated that there would  
19 be some limited discovery of a quick nature in  
20 order to afford the parties the process that  
21 they're due. And then we would move  
22 expeditiously into the hearing.

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1           The Bureau has an interest in  
2       seeing this whole matter moved forward as  
3       quickly as possible. We think that some very  
4       limited discovery is warranted, if for no  
5       other reason that it would avoid a remand  
6       after your decision comes out, where the  
7       parties claim that they haven't been afforded  
8       their due process. So some limited discovery  
9       is warranted. Perhaps you could order the  
10      parties to file their requests within one week  
11      to notice, to do very limited document  
12      requests, perhaps ten with no subparts, to do  
13      very limited interrogatories, as Your Honor  
14      suggested, where they ask simply for the  
15      identification of witnesses who have been -

16           JUDGE SIPPEL: I'm bidding against  
17      myself. I already got an offer of no  
18      interrogatories. I like that one better.

19                   (Laughter.)

20           JUDGE SIPPEL: Let's move on.

21           MR. SCHONMAN: And then notice  
22      witnesses for cross examination within a week

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1 after receiving the names of people, and  
2 conducting those depositions expeditiously,  
3 and concluding, perhaps, by the end of  
4 January, all discovery by the end of January.  
5 Is it a rough schedule, is it a tight  
6 schedule? Certainly. Is it consistent with  
7 what the Commission and the Media Bureau  
8 wanted? I think so. It's not going to keep  
9 us within 60 days, but it certainly moves it  
10 along. It gives one side the discovery that  
11 they want, but it's very limited so that we  
12 can move right into the hearing. And perhaps  
13 we can have the hearing as early as mid-March.

14 JUDGE SIPPEL: Well, I got March  
15 1, I got mid-March, and I got 1 April.

16 (Simultaneous speech.)

17 JUDGE SIPPEL: Okay. That's a  
18 firm date to -

19 MR. COHEN: He said the end of  
20 January. We think another month is warranted,  
21 but that's not a dramatically different view  
22 of the world. And if he's talking about

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1 starting a hearing six weeks or so after the  
2 completion of discovery, which is what I just  
3 heard from the Media Bureau, I think that's  
4 acceptable to us.

5 (Simultaneous speech.)

6 MR. LEVY: Your Honor, we would  
7 argue for a more accelerated process. The  
8 evidence is already very much developed. I  
9 don't see any reason why we couldn't be in a  
10 hearing by the end of January, or the very  
11 beginning of February. Look at all the  
12 lawyers around, and all the resources that are  
13 available here. We don't need six weeks from  
14 the close of discovery to prepare for a  
15 hearing, especially because most of us already  
16 have most of the evidence in our briefcase  
17 already on both sides. It's not just the NFL  
18 Network that submitted its evidence, Comcast  
19 has submitted its evidence, as well, in  
20 connection with its answer in the complaint  
21 proceeding. So we think that late January,  
22 first week of February we should be in a

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1 hearing, and that we should move things along  
2 expeditiously to bring the hearing to a  
3 conclusion. No reason that the hearing should  
4 last more than a week or two, even for all  
5 these parties.

6 JUDGE SIPPEL: Let me hear on this  
7 side of the table. I'm going to get back to  
8 you.

9 MR. SCHONMAN: The Bureau would  
10 agree with that expedited schedule, that we  
11 can start the hearing perhaps mid-February.

12 MR. LEVY: I had suggested  
13 beginning of February, February 2<sup>nd</sup>, which is  
14 a Monday.

15 MR. SCHONMAN: Cut the baby in  
16 half. We could cut it in thirds.

17 MR. SOLOMON: Your Honor, we were  
18 about to say that although we think it's very  
19 aggressive, that if the Enforcement Bureau's  
20 view that it just said a moment that basically  
21 discovery would conclude by the end of  
22 January, we think that would be very

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1       difficult. But in the interest of -- if the  
2       Enforcement Bureau's view is that that's the  
3       minimum amount required for due process under  
4       Judge Steinberg's order, we're willing to try  
5       to live with that, and see how it goes, and  
6       try to negotiate with the parties,  
7       particularly if they're not interested in  
8       doing fact witness, if that may make it  
9       easier. But we think if you start going -  
10      after that the hearing is going to start the  
11      next day, there are a lot of issues about  
12      putting together your case, having evidentiary  
13      motions before Your Honor, that have their  
14      direct cases, our rebuttal cases, it's not  
15      particularly realistic to say that the minute  
16      discovery ends, the hearing is going to start.  
17      But we do think we could live, although we  
18      think it's very aggressive, live with  
19      discovery that closes at the end of January.

20               MR. MILLS: Your Honor, I don't  
21      even think that's realistic, to tell you the  
22      truth. We haven't built in any time for

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1 expert reports or expert depositions at all.  
2 And we're only -- I'm representing Cox. We're  
3 only involved in the WealthTV case. I don't  
4 know what's involved in the NFL case, or the  
5 MASN case, and it sounds like they feel like  
6 they've got all the evidence they need, and  
7 that's fine. But it's a far cry to say that  
8 because the opposing party has submitted their  
9 own self-serving declarations, that only cover  
10 the information they would like to say, that  
11 you, therefore, are prepared to cross examine  
12 them on things that they did not choose to  
13 say. We need discovery of documents at a  
14 minimum, and we're fine with the idea that we  
15 don't need to take back depositions, but we  
16 would like to get documents. We're okay not  
17 taking interrogatories, but we'd like to get  
18 documents. We'd like to have experts where we  
19 can take their depositions, and have enough  
20 time to fairly cross examine those experts on  
21 their own reports. And we worked up a  
22 proposed schedule that had this very --

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1        actually, coincidentally, the very same idea  
2        in mind, where there was no fact depositions,  
3        and there were no interrogatories, but there  
4        was limited number of document requests, in  
5        fact ten. And I have a number of copies, I  
6        don't know if I have enough copies for all the  
7        lawyers in town, but if you're interested,  
8        this would be something we could at least  
9        begin to discuss.

10                JUDGE SIPPEL: Fine. That's good.  
11        That's good. I think I'm going to stay with  
12        what I'm hearing so far. End of January, the  
13        close of January is going to be the end of -

14                MR. SOLOMON: Your Honor, just to  
15        be clear, we were talking about that in the  
16        context, and maybe I misunderstood, of the  
17        Wealth TV case. As I said before, the other  
18        cases I think are more factually - potentially  
19        more factually complicated, and will take  
20        longer. But that may not be a problem,  
21        because if the hearings are tiered, perhaps  
22        there could be a deadline for the WealthTV

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1 cases, and then a deadline somewhat later for  
2 the other cases. The hearing won't begin as  
3 quickly for them.

4 JUDGE SIPPEL: That makes sense.  
5 How about you, Mr. Schonman, does that make  
6 sense to you? Will we get this thing off the  
7 ground by -- what day were you talking about,  
8 in February sometime?

9 MR. SOLOMON: He said mid-March.

10 MR. SCHONMAN: I initially said  
11 mid-March, but I think on reflection that  
12 starting a hearing in mid-February would be  
13 more appropriate.

14 JUDGE SIPPEL: Well, we might be  
15 able to do that with, is it the WealthTV  
16 cases?

17 MR. SOLOMON: I think that would  
18 be -- I think that would -

19 MR. SCHONMAN: We can conduct  
20 discovery simultaneously.

21 JUDGE SIPPEL: Of course. Tell  
22 you what -- we've got to enter some hearing

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1        dates first.

2                MR. COHEN: Your Honor, I do think  
3        what you're hearing from three of the four  
4        Wealth defendants is that another month would  
5        be much more necessary and preferable. And we  
6        haven't heard -- I'm sure Ms. Wallman wants  
7        the earliest possible date.

8                JUDGE SIPPEL: Ms. Wallman?

9                MR. COHEN: But I don't -- we're  
10       not endorsing what Comcast said. I mean, the  
11       fact of the matter is, a lot of the clients  
12       are away, and we're heading into a holiday  
13       season, and we do not have -- we can't pretend  
14       that the second half of December and the first  
15       week in January are times where we have full  
16       access to either people, or documents, or  
17       experts. And we had suggested March 1, we  
18       would urge you the end of February, as close  
19       that you can come to that. I think the end of  
20       January is unrealistic. And then we can talk  
21       about an appropriate time for a hearing. So  
22       it's not a huge difference.

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1 JUDGE SIPPEL: The end of January  
2 is impractical for anybody, any set up of the  
3 parties, because -

4 MR. MILLS: I don't see how that  
5 could be done with experts. I don't think - I  
6 don't see how you could do that, get expert  
7 reports, get the documents, expert reports,  
8 prepare to depose the experts, and get that  
9 all done.

10 JUDGE SIPPEL: Would everybody -

11 MR. MILLS: We can set up a  
12 proposed schedule, and if somebody can -- and  
13 send it up to -

14 JUDGE SIPPEL: Okay. Well, I can  
15 do this. I mean, I could just -- I do want to  
16 set, I want to set the hearing dates. They  
17 can be set. Certainly, it makes sense that  
18 they be separate hearing dates. And then back  
19 track from there. I mean, maybe there's going  
20 to be a tight squeeze between completion of  
21 discovery and making your opening statements.  
22 In other words, we're not going to maybe have

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1 some luxuries that we otherwise would have.

2 MS. WALLMAN: Your Honor, if I may  
3 have a word?

4 JUDGE SIPPEL: Yes, ma'am. Ms.  
5 Wallman.

6 MS. WALLMAN: I would urge Your  
7 Honor there be much tighter, much more  
8 adherence to the proposal of Mr. Levy with  
9 respect to the WealthTV cases. We're talking  
10 about half a dozen of the country's largest  
11 and most competent law firms litigating  
12 against me and my backup co-counsel here. One  
13 company operating out of one building in San  
14 Diego. This is not going to be a momentous  
15 monumental discovery process.

16 The complaint against Time Warner,  
17 the first we filed have been pending since  
18 December of 2007. There has been loads of  
19 time for people to think about what the case  
20 might look like, what the issues are. I've  
21 been thinking about it a lot. I know how many  
22 experts I'm going to need, how many I'm going

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1 to produce. They're already mostly known to  
2 my colleagues representing the cable  
3 companies.

4 I just don't see what the great  
5 need for delay may be, and this has been  
6 pending a long time in toto, and I would urge  
7 you to adhere to a schedule like the one that  
8 Mr. Levy has suggested. This schedule that  
9 takes us out to the commencement of hearing  
10 almost in May of next year -

11 JUDGE SIPPEL: No, may has not  
12 been a date.

13 MS. WALLMAN: Well, this is the  
14 schedule -

15 JUDGE SIPPEL: The first of April  
16 is the latest we've gone.

17 MS. WALLMAN: April 27<sup>th</sup>.

18 JUDGE SIPPEL: Well, that's his.  
19 That's not mine.

20 MS. WALLMAN: Okay. Well, I'm  
21 looking at the schedule he proposed.

22 MR. COHEN: Your Honor, we

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1 certainly could live with an April 1 start,  
2 and end of February for discovery, or even  
3 third week in February to deal with the  
4 problem of the holidays.

5 JUDGE SIPPEL: You're awfully  
6 close. Yes, ma'am. Wait just a second.

7 MS. MONTEITH: With all due  
8 respect, I have to weigh-in in favor of Ms.  
9 Wallman's proposal here. I think these  
10 parties in this case has been pending for an  
11 extraordinary amount of time. If counsel on  
12 the other side of the table knows that they  
13 can limit themselves to ten interrogatories,  
14 I think they have probably - excuse me - ten  
15 requests for document production.

16 JUDGE SIPPEL: Documents, yes.  
17 Thank you.

18 MS. MONTEITH: I think they  
19 probably know what those ten requests will be  
20 right now. I see no reason why discovery  
21 could not take place tomorrow. Exchange of  
22 documents -

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1 MR. COHEN: We don't have a  
2 protective order, for one thing.

3 MS. MONTEITH: How long have the  
4 parties been working on the protective order?

5 JUDGE SIPPEL: You can get the --  
6 I'm sorry. Go ahead.

7 MR. MILLS: We submitted our  
8 comments and the parties still -- the  
9 protective order needs to be negotiated.  
10 That's going to take until next week, because  
11 the holiday is upon us. Then you have -- even  
12 if the following week you get discovery out  
13 and get 30 days for even limited documents.  
14 I mean, if you look at this, I'm not saying it  
15 can't be compressed, and if you want to have  
16 the hearings beginning of April, that makes  
17 sense. That's fine. But I don't think you  
18 can compress it much more, and give the  
19 parties who are accused of misconduct here,  
20 and deny it, their due process, and their  
21 opportunity to get the documents so they can  
22 cross examine and not rely simply on the one-

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